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UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

Brenda Whittaker, individually and on behalf)
 of all others similarly situated,)
)
 Plaintiff,)
)
 vs.)
)
 Paul Moss Insurance Agency, Llc d/b/a Epiq)
 Insurance Agency, an Ohio limited liability)
 company)
)
 Defendant.)
)
 _____)

No. 3:22-cv-08077-SMB

**DEFENDANT’S DISCOVERY
 DISPUTE MEMORANDUM**

Defendant Paul Moss Insurance Agency dba Epiq Insurance Agency (“Paul Moss”) requests the Court deny plaintiff Brenda Whittaker’s (“plaintiff”) request to conduct pre-certification class related discovery. This Court should deny plaintiff’s request for an order to compel the production of Leads, outbound calls, and call logs of non-party and unnamed individuals because it is a fishing expedition to identify potential plaintiffs, which is outside the scope of Rule 26 and premature given plaintiff has not established, and cannot establish, Rule 23 requirements.

Plaintiff alleges Paul Moss violated the Telephone Consumer Protection Act (“TCPA”) when it made allegedly unsolicited calls to plaintiff’s cellphone, which she asserts was

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1 registered with the National Do Not Call Registry. However, plaintiff provided express consent
2 to receive such calls when she entered her personal information and consented to receive calls
3 and text messages for auto insurance quotes on a website owned and operated by Renuant, LLC
4 dba Transparent.ly (“Renuant”). Renuant then sold the Lead to Paul Moss given plaintiff’s
5 interest and consent. Plaintiff denies she provided consent. Plaintiff now seeks pre-class
6 certification discovery to conduct a fishing expedition to identify clients despite not providing
7 any inclination there are other individuals who were contacted under the same circumstances.
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10 Pre-class certification discovery should not be permitted when such discovery runs afoul
11 of Federal Rules of Civil Procedure Rules 26(b)(1) and 23. Rule 23 permits class certification
12 only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are
13 questions of law and fact common to the class, (3) the claims or defenses of the representative
14 parties are typical of the claims or defenses of the class, and (4) the representative parties will
15 fairly and adequately protect the interests of the class, Fed. R. Civ. P. The burden is on the
16 plaintiff to establish all elements of Rule 23. *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir.
17 1985). If the plaintiff fails to show discovery is likely to produce substantiation of the class
18 allegations, then to deny plaintiff’s request for pre-class certification discovery is not an abuse
19 of discretion. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir.1977).
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22 Federal Rules of Civil Procedure Rule 26(b)(1) limits the scope of discovery to
23 “nonprivileged matter that is relevant to any party’s claim or defense.” The Supreme Court has
24 determined that seeking discovery of the name of a class member is not relevant within the
25 meaning of Rule 26(b)(1). *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). Where the
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1 plaintiff fails to make a prima facie showing of Rule 23 prerequisites, the burden is on the
2 plaintiff to demonstrate discovery measures are likely to produce persuasive information
3 substantiating the class action allegations. *Doninger*, 564 F.2d at 1313 citing *Hatfield v.*
4 *Williams*, 64 F.R.D. 71, 75 (N.D.Iowa 1974).
5

6 In *Mantolete*, the plaintiff sought pre-class certification discovery to establish a national
7 class, but was denied such discovery because the plaintiff did not provide a showing that class
8 discovery would “produce persuasive information substantiating the class action allegations.”
9 767 F.2d 1416. Also, in *Mantolete*, the plaintiff identified two other individuals in similar
10 circumstances, whereas here, the plaintiff has not identified a single individual with a similar
11 circumstance.
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13 Likewise, in *In re Williams-Sonoma, Inc.*, the court held it was error for the trial court
14 to permit discovery to obtain the identities of unnamed class members prior to class
15 certification. 947 F.3d 535, 540 (9th Cir. 2020).
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17 Here, plaintiff seeks pre-class certification discovery to obtain the names and personal
18 information for all Leads Paul Moss purchased from Renuant in the same manner plaintiff’s
19 Lead was purchased and all outbound calls made by Paul Moss in order to identify absent class
20 members. However, plaintiff has not made a prima facie showing such discovery would produce
21 information substantiating the class allegations. The identities of absent class members are not
22 relevant to the parties’ claims or defenses under Rule 26(b)(1), Fed. R. Civ. P. Therefore,
23 plaintiff’s request for pre-class certification discovery must be denied.
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1 Although Paul Moss asserts pre-class discovery is not permitted, in the alternative, if
2 the Court finds pre-class certification discovery is permitted, we request the Court limit the
3 discovery to those in the same position as plaintiff, which includes those who are (1) allegedly
4 fully registered on the National Do Not Call Registry, (2) were allegedly called by Paul Moss
5 more than once in a 12 month period, (3) the call was for the purpose of selling products and
6 services, and (4) Paul Moss received prior express consent from Renuant of which the individual
7 alleges is fake. In instances where pre-class certification discovery is permitted, the discovery is
8 limited to certification issues such as the number of class members, the existence of common
9 questions, typicality of claims, and the representative's ability to represent the class.
10 *Oppenheimer Fund*, 437 U.S. at 359. However, to produce an outbound call list that meets
11 plaintiff's alleged class description is oppressive, unduly burdensome, and exceeds the scope of
12 discovery under Federal Rule of Civil Procedure 34. It requires Paul Moss to create documents
13 when Rule 34 only requires parties to produce documents that already exist.
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17 Similarly, since the discovery, if any, should be limited to those who assert the express
18 consent provided was fake, this requires Paul Moss to identify calls that were made pursuant to
19 express consent, yet the recipient alleges the consent was fake. To produce such documentation
20 would require to Paul Moss to create documents and information not already in business
21 records.
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23 Lastly, the time frame for discovery should be limited to plaintiff's allegations which is
24 January 5-6, 2022. Anything beyond this timeframe would be an undue burden and oppressive.
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1 The information being sought is not kept in the normal course and scope of business, which goes
2 against what is discoverable under Rule 34.

3 Paul Moss requests the Court deny plaintiff's pre-class certification discovery requests.
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5 However, should the Court consider granting plaintiff's requests, it should be limited to the
6 discovery limitations identified above.

7 DATED this 6th day of December, 2022.

8
9 TYSON & MENDES, LLP

10 By: /s/ Leah M. McKeever
11 Sitar Bhatt
12 Leah M. McKeever
13 *Attorneys for Defendant*

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on December 6, 2022, I electronically transmitted the attached
16 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of
17 Electronic Filing to the following CM/ECF Registrants:

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